FILED
OCT 7 - 2002
OFFICE OF THE CLERK

No. 02 601

In the

Supreme Court of the United States

BOARD OF COMMISSIONERS OF THE ORLEANS LEVEE DISTRICT, JAMES HUEY,

Petitioners,

v.

ANTHONY L VOGT, WARNER C VOGT, JANET VOGT PARKER, STEVEN REED VOGT, RAYMOND VOGT, ALVIN VOGT, ELIZABETH NELSON FARBER, JOHN J VOGT, III, PATTY ANN VOGT, MONICA VOGT WERTZ, ALLAN M EDGECOMBE, WILBERT J EDGECOMBE, LLOYD R EDGECOMBE, HAROLD C EDGECOMBE, MARGUERITE EDGECOMBE ROSENTHAL, AUDRY EDGECOMBE REICHERT, FRANKLIN PENROSE EDGECOMBE, III, EULA EDGECOMBE CLEMENT, ERBA M CORDELL, CHARLES A LEE, JR, MAUREEN LEE HEATH, ANDREW FRANCES LEE, KATHLEEN LEE MACHADO, BYRON LEE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

I.The Fifth Circuit held that the Orleans Levee District has "taken" the property of the plaintiffs by not satisfying the prior money judgment against it. In doing so, the Fifth Circuit found that the money judgment was the property of the plaintiffs. Did the Fifth Circuit err by confusing a liquidated money judgment expressed as a "royalty" with a "mineral interest" in holding that the Orleans Levee District had taken the property of the plaintiffs?

II. Does the Orleans Levee District, an agency of the State of Louisiana, enjoy sovereign immunity as an "arm of the state" under the 11th Amendment to the U.S. Constitution so as to bar the present lawsuit in federal court?

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CITATIONS OF OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS

The opinion of the United States District Court for the Eastern District of Louisiana holding that the Orleans Levee District is an "arm of the state" according to Louisiana statutes and state and federal jurisprudence is reported at 2001 WL 664580.

The opinion of the Fifth Circuit Court of Appeals upon which this writ is based is reported at *Vogt v. Board of Com'rs of Orleans Levee Dist.*, 294 F.3d 684 (5th Cir.(La.) Jun 14, 2002).

The denial of the petition for rehearing *en banc* is reported at Vogt v. Board of Com'rs of Orleans Levee Dist., --- Fed.Appx. ----, --- F.3d ---- (5th Cir.(La.) Jul 08, 2002) (TABLE, NO. 01-30728). Each of these opinions is attached in the appendix to this writ application.

STATEMENT OF BASIS FOR JURISDICTION

The United States Court of Appeals for the Fifth Circuit entered a judgment on June 14, 2002 holding that the Orleans Levee District was not entitled to 11th Amendment immunity and, in *dicta*, that the failure to satisfy the judgment against it constituted a "taking." The defendant's Petition for Rehearing *en banc* was denied on July 8, 2002. This writ application was timely filed.

Subject matter jurisdiction of the District Court was invoked under 28 U.S.C. § 1343 in that it is based on the 14th Amendment to the United States Constitution. Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Eleventh Amendment to the United States Constitution provides:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

Article 12 section 10 of the Louisiana Constitution provides:

> "(A) No Immunity in Contract and Tort. Neither the state, a state agency, nor a political subdivision shall be immune from suit and liability in contract or for injury to person or property.
>
> (B) Waiver in Other Suits. The legislature may authorize other suits against the state, a state agency, or a political subdivision. A measure authorizing suit shall waive immunity from suit and liability.
>
> (C) Limitations; Procedure; Judgments. Notwithstanding Paragraph (A) or (B) or any other provision of this constitution, the legislature by law may limit or provide for the extent of liability of the state, a state agency, or a political subdivision in all cases, including the circumstances giving rise to liability and the kinds and amounts of recoverable damages. It shall provide a procedure for suits against the state, a state agency, or a political subdivision and provide for the effect of a judgment, but no public

property or public funds shall be subject to seizure. The legislature may provide that such limitations, procedures, and effects of judgments shall be applicable to existing as well as future claims. No judgment against the state, a state agency, or a political subdivision shall be exigible, payable, or paid except from funds appropriated therefor by the legislature or by the political subdivision against which the judgment is rendered."

LSA-R.S. 31:16 provides:

"The basic mineral rights that may be created by a landowner are the mineral servitude, the mineral royalty, and the mineral lease. This enumeration does not exclude the creation of other mineral rights by a landowner. Mineral rights are real rights and are subject either to the prescription of nonuse for ten years or to special rules of law governing the term of their existence."

LSA-R.S. 31:18 provides:

"A mineral right is an incorporeal immovable. It is alienable and heritable. The situs of a mineral right is the parish or parishes in which the land burdened is located. All sales, contracts, and judgments affecting mineral rights are subject to the laws of registry."

LSA-R.S. 31:213(5) provides:

"Royalty" as used in connection with mineral leases, means any interest in production, or its value, from or attributable

> to land subject to a mineral lease, that is deliverable or payable to the lessor or others entitled to share therein. Such interests in production or its value are "royalty," whether created by the lease or by separate instrument, if they comprise a part of the negotiated agreement resulting in execution of the lease. "Royalty" also includes sums payable to the lessor that are classified by the lease as constructive production.

STATEMENT OF THE CASE

A. General Background and Description

The Orleans Levee District was created by the Louisiana legislature in 1890 for the purpose of protecting the City of New Orleans from floods. In 1924, the state legislature authorized the levee district's Board of Commissioners ("the levee board") to acquire 33,000 acres of land on the east bank of the Mississippi River about 50 miles south of New Orleans in order to build the Bohemia Spillway between the River and the Gulf of Mexico. 1924 La. Acts 99. Approximately half of this land was public property transferred from the state; the other half was either purchased outright, expropriated or purchased under threat of expropriation from private owners. 1928 La. Acts 246; 1942 La. Acts 311. In 1984, the Louisiana legislature decided to return the land taken for the Bohemia Spillway. 1984 La. Act 233. Act 233 also directed the levee board to "provide a thorough accounting . . . concerning all revenues received from the affected property." The Act was signed by the governor and went into effect on June 29, 1984. The levee board challenged the constitutionality of Act 233, but both state and federal courts rejected the argument that Act

233 was an unlawful taking of the levee district's property in violation of Article I, Section 4 of the Louisiana Constitution as well as the Fifth and Fourteenth Amendments of the United States Constitution. *Board of Commissioners of the Orleans Levee Dist. v. Dep't of Natural Resources,* 496 So.2d 281, 285 (La.1986); *Board of Levee Commissioners of the Orleans Levee Bd. v. Huls,* 852 F.2d 140, 141 (5th Cir.1988).

A group of 24 plaintiffs then filed a civil action in state court requesting (1) a declaratory judgment confirming their ownership of the disputed mineral royalties, (2) an accounting of all mineral royalties paid to the levee board after June 29, 1984, and (3) a money judgment for the royalties that the levee board had not repaid. The Louisiana Court of Appeals held, based on the clear language of Act 233, that the levee board had no right to revenues from the expropriated property after the effective date of Act 233. *Vogt v. Board of Levee Commissioners of the Orleans Levee Dist.,* 680 So.2d 149, 157-59 (La.App. 4 Cir.1996), *writ denied,* 684 So.2d 923. After an accounting, the Louisiana courts entered a money judgment against the levee board and in favor of the landowners for $2,853,358.44 in collected mineral royalties. *Vogt v. Board of Commissioners of the Orleans Levee Dist.,* 738 So.2d 1142 (La.App. 4 Cir.1999), *writ denied,* 748 So.2d 1166. In an effort to collect this money judgment, the plaintiffs, now judgment creditors of the levee district, sought a writ of mandamus, but Louisiana courts have long held that a judgment creditor may not use a writ of mandamus or of seizure to force a political subdivision to appropriate funds to pay the judgment.

The judgment creditors filed this action in federal court, claiming that the levee board's refusal to pay the judgment is an unconstitutional taking of their property without just compensation. Originally, the case was

dismissed by the trial court on 11th Amendment grounds. The U.S. Fifth Circuit, however, overturned that dismissal and reinstated the case in the trial court. Moreover, the U.S. Fifth Circuit held, in dicta, that the failure to satisfy the judgment held by the plaintiffs constituted a federal "taking."

ARGUMENT

A. Standard of Review

Under Rule 10 of the United States Supreme Court Rules, a writ of certiorari may be granted when the decision of the Court of Appeals conflicts with the decision of another U.S. circuit court on the same important matter, a decision of the state court of last resort, or is so far departed from accepted and usual course of judicial proceedings as to call for supervision. The present case implicates the first two considerations.

B. *The Fifth Circuit decision conflicts with the established jurisprudence of the Louisiana Supreme Court on an important federal question.*

In the holding handed down by the Fifth Circuit, the court misconstrued an important point of both federal and of Louisiana law. In doing so, the Fifth Circuit decision conflicts with the established jurisprudence of the Louisiana Supreme Court, that State's court of last resort. The Fifth Circuit noted that:

> [I]n the levee board's view, the state courts' holding that the landowners' judgment is unenforceable against the levee board

> effectively recharacterizes their property right in mineral royalties into an intangible claim against the levee board's property. *Vogt*, 814 So.2d 648. What was the landowners' property has suddenly vanished behind a veil of sovereign immunity in state court. We hold, however, that this result is untenable against a federal takings claim.

Vogt, et al. v. Bd of Com'rs of the Orleans Levee District, et al., 294 F.3d 684, 697 (5th Cir.2002).

In fact, the Fifth Circuit has it exactly backwards. By reclassifying a money judgment as the "property" of a judgment creditor, the Fifth Circuit has opened the floodgates such that every judgment creditor in that circuit will now be in a position to collect a judgment against a state through a federal "takings" claim. This is a method of collection the legislature has sought to prevent and which the courts of the State of Louisiana have expressly forbidden. *see Kimble v. Giordano*, 667 So.2d 542 (La.1996); *Chamberlain v. State, Through DOTD,* 624 So.2d 874 (La.1993); LSA-Const. art. 12 §10(C). Such a decision would render the 11th Amendment protection meaningless in the Fifth Circuit.

More importantly, such a decision would open the federal courts to all judgment creditors who are unable to collect their judgments in state courts. Conceivably, every trial against the State of Louisiana could have two phases: first, the trial and judgment in state court, and second, the federal court collection of the property "taken" when the judgment was not promptly satisfied. The already crowded federal docket would grow exponentially to accommodate the collection of judgments against states and state agencies. Moreover, the ability to meet budgetary demands of state

government would be subjugated to the demands of such judgment creditors and governmental functions could be in jeopardy.

In order for the Fifth Circuit to reach such a decision, it interpreted the law of the State of Louisiana in a way that conflicts with the established decisions of the Louisiana Supreme Court on the definition of "royalty" as it applies to minerals. Apparently, the confusion lies in the distinction between a "mineral right" and a "royalty."

A "mineral right" in Louisiana is defined as an incorporeal immovable. LSA-R.S. 31:16-18. Property in Louisiana is divided into several types: corporeal (tangible things which have shape and form) as opposed to incorporeal(intangible things which do not), and movable (chattels) as opposed to immovable(real property). As a "mineral right" is classified as an incorporeal immovable, Louisiana regards it as an intangible right attached to a piece of real property. The "mineral right" is, itself, property. *Id.*

A "royalty," on the other hand, is defined as "any interest in production, or its value, from . . . land subject to a mineral lease, that is deliverable or payable to the lessor or others entitled to share therein. . ." LSA-R.S. 31:213(5). This definition was established over 50 years ago when the Louisiana Supreme Court precisely defined "royalty" in the landmark case of *Vincent v. Bullock*, 187 So. 35 (La.1939). In this decision, the court of last resort in Louisiana drew from many different sources in crafting the definition. The *Vincent* court noted that:

> [T]he term 'royalty' is defined by Thornton, Law of Oil and Gas (4th ed.), to be '* * * a sum paid after the production of oil or minerals and after they had been reduced to possession, in a certain proportion to the

> production thereof' Volume 1, Section 253, and by Corpus Juris, in reference to oil and gas leases, to be '* * * a share of the product or profit reserved by the owner for permitting another to use the property * * * the compensation provided for the privilege of drilling for oil and gas, and consists of a share in the oil and gas produced under existing leases* * *.' Corpus Juris 1107." *Vincent,* 187 So. at 39.

Further, the court cited with approval the definition posited by Harriet Spiller Daggett:

> The word royalty originated in England where it was used to designate the share in production reserved by the crown from those to whom the right to work mines and quarries was granted. Such is its proper use today in mineral contracts. It is the price paid for the privilege of exercising the right to explore. If that right is granted by a lease contract, it is the whole or part of the consideration for the lease. If that right is granted or reserved by a sale, it is the consideration in part or whole of the sale. *Royalty in itself cannot be used to designate the fundamental right which is being dealt with but only to indicate the percentage, the price, the rent, the consideration attached to or proceeding out of the right or that may proceed from it during its existence.* The royalty depends upon the continued existence of the right to which it is an appendage. It cannot have a life of its own any more than could interest

> exist apart from the note or debt to which it is attached. . .

Id.(emphasis in original).

Accordingly, the Louisiana Supreme Court and legislature define a "royalty" such as the judgment owed by the Orleans Levee District to the plaintiffs, as a sum of money to be paid as opposed to an intangible property right subject to being "taken." The Fifth Circuit decision, by portraying the non-payment of the money judgment for "royalties" as a "taking," effectively holds that the "royalty," or judgment, owed is somehow the "property" of the plaintiffs. This is a clear misinterpretation of Louisiana law as expressed by the legislature and the Louisiana Supreme Court.

As stated above, prior to Act 233 of 1984, the Orleans Levee District was the true and lawful owner of the land and the mineral rights. The plaintiffs disputed the amount of royalties that the Orleans Levee District owed to them; thus they eventually received a money judgment against the Levee District. This money judgment is for the payment of damages, expressed as "royalties," awarded by a Louisiana state court. Obviously, these damages are not the "property" of the plaintiffs anymore than an award of damages in an auto accident is the "property" of the injured plaintiff.

To follow the logic put forth by the plaintiffs and joined by the Fifth Circuit, every money judgment for damages could become a "takings" case. For the reasons set forth above, this simply can not be the law.

Even though the panel attempted to limit its holding "to cases where, as in *Webb's*[Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 163-64, 101 S.Ct. 446, 452, 66 L.Ed.2d 358 (1980)], the government has forcibly appropriated private property without a claim of right or of

public or regulatory purpose." *Vogt,* 294 F.3d at 697, it has opened the federal courts in a way intended by neither the U.S. nor the Louisiana constitutions, nor by the court of last resort in the State of Louisiana.

It is respectfully submitted that the Fifth Circuit decision conflicts with the Louisiana Supreme Court on this important point of federal "takings" law and, accordingly, this Court should exercise its supervisory authority to correct the decision of the Fifth Circuit on this important issue of federal and state law.

C. The standard for determination of 11th Amendment immunity used by the Fifth Circuit conflicts with the standards of other circuits and of this Court.

This Court has noted that the six-factor test set forth in *Lake Country Estates, Inc. v. Tahoe Regional Planning Authority,* 440 U.S. 391, 99 S.Ct. 1171, 59 L.Ed.2d 401 (1979), without any weight ascribed to particular criteria, has caused the various circuit courts to struggle with the analysis. *Hess v. Port Auth. Trans-Hudson Corp.,* 513 U.S. 30, 115 S.Ct. 394, 130 L.Ed.2d 245 (1994); *Puerto Rico Ports Authority v. M/V Manhattan Prince,* 897 F.2d 1, 9 (CA1 1990) (considering seven factors), distilling factors, see *Benning v. Board of Regents of Regency Universities,* 928 F.2d 775, 777 (CA7 1991) (considering four factors), and deeming certain factors dispositive, compare *Brown v. East Central Health Dist.,* 752 F.2d 615, 617-618 (CA11 1985) (finding state treasury factor determinative), with *Tuveson v. Florida Governor's Council on Indian Affairs, Inc.,* 734 F.2d 730, 732 (CA11 1984) (suggesting that state courts' characterization of entity is most important criterion). See generally Note, Clothing State Governmental Entities with Sovereign Immunity: Disarray

in the Eleventh Amendment Arm-of-the-State Doctrine, 92 Colum.L.Rev. 1243 (1992) (summarizing diffuse responses). It is respectfully submitted that the present case provides this Court with the opportunity to provide guidance to the circuits and clarify the federal 11th Amendment sovereign immunity analysis.

In the present case, the Orleans Levee District has been sued by individual citizens of the State of Louisiana in what has been couched as a federal "takings" claim. The relevant facts of the case have been summarized above and, in the interest of page economy will not be reiterated here.

The U.S. Fifth Circuit uses a 6 factor test enumerated in *Clark v. Tarrant County, Texas,* 798 F.2d 736, 744 (5th Cir.1986) to determine whether or not an entity is to be considered an "arm of the state" for 11th Amendment sovereign immunity purposes. The *Clark* factors considered by the Fifth Circuit are as follows:

> (1) whether the state statutes and case law characterize the agency as an arm of the state;
> (2) the source of the funds for the entity;
> (3) the degree of local autonomy the entity enjoys;
> (4) whether the entity is concerned primarily with local, as opposed to statewide, problems;
> (5) whether the entity has authority to sue and be sued in its own name; and
> (6) whether the entity has the right to hold and use property."

Clark, 798 F.2d at 734.

The Fifth Circuit considers the most significant

factor to be "whether the judgment will be paid out of state funds." *e.g. Delahoussaye v. City of New Iberia,* 937 F.2d 144, 147-48 (5th Cir.1991). This emphasis ignores the clear language of the amendment itself and the jurisprudence of this Court. The Eleventh Amendment clearly states, "[t]he Judicial power of the United States shall not be construed to extend to any suit in law *or in equity*, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. Amend XI[emphasis added]. The "Eleventh Amendment 'by its terms' clearly extends beyond actions seeking money damages." *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 60, 115 S.Ct. 394, 130 L.Ed.2d 245 (1994)(Scalia,J. dissenting)(citing *Cory v. White,* 457 U.S. 85, 91, 102 S.Ct. 2325, 2329, 72 L.Ed.2d 694 (1982)). However, the Fifth Circuit analysis does not consider this factor at all. It is again respectfully submitted that the 11th Amendment question is a matter of great national importance upon which the circuit courts are divided.

As the circuit courts are divided over the proper standard for applying 11th Amendment immunity, this case provides this Court with an opportunity to clarify this important issue.

D. Even had the Fifth Circuit properly set forth the test for 11th Amendment immunity, it incorrectly applied the test to the case sub judice.

Each of the factors set forth in the Fifth Circuit test is addressed below.

1. *The royalties are sought to be collected from the Property of the State of Louisiana.*

As stated earlier, the second factor in the *Clark* analysis is "given the greatest weight because one of the principal purposes of the Eleventh Amendment [in the Fifth Circuit] is to protect state treasuries." *Vogt* at *6. The panel noted that this inquiry involves a two part test: "first, and most importantly, the state's liability in the event there is a judgment against the defendant, and second, the state's liability for the defendant's general debts and obligations." *Id.*

On this issue, a prior Fifth Circuit decision on this point, *Huls,* was explicit. It held that the property of the Bohemia Spillway that is involved in this case belonged to the State of Louisiana; not to the Levee District. *Huls,* 852 F.2d at 141-43. "It is incomprehensible to conceive that the property [the spillway] is now not the state's land." *Id.* "The land in question here was state land and the mineral interests were state property." *Id.* Finally:

> as between the state and its agency, property is placed under the control of the agency for supervision and administration, the land to all practical intents and purposes being still the property of the state.

Id.(citing Bd. of Com'rs of the Orleans Levee Dist. v. Dept. of Nat. Res., 483 So.2d 958 (La.) *on rehearing*, 496 So.2d 281 (La.1986)).

If the royalties held by the Levee District were, in reality, the property of the state, the lawsuit, in reality, was seeking these very same state royalties whether or not the State of Louisiana is a named defendant. Following the reasoning in *Huls*, the source of payment for a judgment ordering the return of these very same royalties would, then, be the treasury of the State of Louisiana.

Accordingly, this factor weighs in favor of finding that sovereign immunity is applicable in this case.

In the present case, the Fifth Circuit found, in the proceedings below, that the State of Louisiana is not responsible for the payment of the judgment against the Orleans Levee District. This holding, contradicting the *Huls* decision, shows that there is confusion even within the Fifth Circuit itself on this point.

As for the second inquiry in this two-part test, it is respectfully submitted that the State is responsible for the general debts and obligations of the Orleans Levee District based on the authority to tax granted to the levee district by the State of Louisiana.

2. *The Local Autonomy Exercised by the Levee District in this case is Limited.*

While the Levee District may exercise a certain level of local autonomy in other areas of operations, in the area of acquisition, construction, and return of the spillway property on which this litigation is based, the Levee District has *no* autonomy. The *Huls* court was explicit in this area as well. The Levee District was created and its authority defined by the State of Louisiana. The Levee District's "power and property comes about only because it has the power of the state." *Id.* The property at issue was obtained "by employing the power of the state to expropriate the land." *Id.* "In taking the land, the Board was acting as the state." *Id.* As to the property which was acquired using the power of the state and at all times owned by the state itself, "[t]he state could dispose of that land, including the attached mineral interests, as it saw fit." *Id.*

A certain degree of local autonomy in other areas notwithstanding, the Levee District has little or no control over the Bohemia Spillway property that was the subject of

the *Huls* decision and the case *sub judice*. This factor weighs in favor of a finding of immunity.

3. *Flood Control Along the Mississippi River is a Statewide Problem Divided into District for Convenience.*

The *Huls* court made no finding on this issue, but the Levee District submits that the State of Louisiana considers flood control along the Mississippi River a statewide concern. In fact, the Levee District was originally ordered to acquire the property at issue which lies outside its territorial boundaries in an effort by the state to address this concern. The division of responsibility into manageable districts is merely a matter of convenience.

After the recent hurricane, Isidore, and throughout the rest of the hurricane season, it should be readily apparent that flood control along the Mississippi River and in the major cities which lie on its banks is a state-wide concern. As stated earlier, the State of Louisiana has merely divided the responsibility of management of flood control into convenient districts. As the levee district is concerned with state-wide as opposed to local problems, this factor weighs in favor of immunity.

4. *The Huls Decision Itself Limited The Right Of The Orleans Levee District To Sue.*

In *Huls,* the Fifth Circuit held that a political subdivision of a state does not enjoy the same rights as a private company or individual to sue the state for an uncompensated "taking" of its property. *Id.* at 142(*citing City of Trenton v. State of New Jersey*, 262 U.S. 182, 43 S.Ct. 534, 67 L.Ed. 937 (1923)). The reasoning behind this holding is clear: the subdivision, agency, or

municipality held property in the name of the state and at the pleasure of the state. The property itself belonged to the state. As such, the state had not taken anything that it did not already own. As discussed *supra*, the spillway property at issue in this case belonged to the state at the time of acquisition and the judgment sought to be collected is for the payment of royalties between the effective date of Act 233 of 1984 and the time when the plaintiffs began to receive royalty payments in their own right.

As the *Huls* court noted: "[t]o allow this suit would be to allow the state to sue the state over state land."[emphasis added] *Id.* at 143. In this situation, the Levee District *is* the state. This factor weighs in favor of immunity.

5. *The right to hold and use land in the spillway context is the right to hold and use the land of the State of Louisiana.*

In this factual scenario, the right to hold and use land is limited by the whim of the legislature. The land in the spillway originally belonged to another levee district. In an attempt to control flooding in the New Orleans area, the legislature decided to construct a spillway. The levee districts where the present spillway is located were not in a financial position to construct such a project. The legislature, obviously viewing the districts as interchangeable for matters of convenience, ordered the Orleans Levee District to take over the project. Once again, the spillway property is located 50 miles below the territorial boundaries of the Orleans Levee District. The Fifth Circuit held, in *Huls*, that the spillway land acquired is the property of the State of Louisiana. The land making up the Bohemia Spillway was acquired in the name of the state and used for the purposes directed by the state. It was

ordered to be returned to the plaintiffs by the state. And the judgment sought to be collected is merely for the royalties collected during the time this land was held by the Orleans Levee District in the name of the State of Louisiana.

The plaintiffs have asserted numerous times in the state and federal courts that this is not a garden-variety judgment creditor case. They argue that the funds necessary to satisfy the judgment they hold already belong to them and that the Levee District is merely refusing to return their property. As stated earlier, this is a misinterpretation of Louisiana jurisprudence and statutory authority. By naming the Levee District without naming the State of Louisiana, the plaintiffs have not changed this fact.

CONCLUSION

Once again, the plaintiffs are no different from any other judgment creditor seeking to collect a money judgment. The judgment at issue is for the "royalties" collected between the effective date of Act 233 of 1984 and the time when the plaintiffs began to receive "royalty" payments in their own right. This is simply a money judgment for the payment of these "royalties." As such, it is no different than a money judgment for property damages to a 1996 Jeep Grand Cherokee involved in an auto accident. The damages awarded have some abstract relation to the Grand Cherokee, but they are not, themselves, the property of the plaintiff. Should the ruling of the Fifth Circuit to the contrary be upheld, a plaintiff whose Grand Cherokee was damaged and who received a judgment for that damage could file a federal "takings" claim if the judgment were not promptly satisfied. This simply, can not be the law.

THEREFORE, Petitioners, The Board of Commissioners of the Orleans Levee District, request that

this Court GRANT its Petition of a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted:

George L. Carmouche, A Professional Law Corporation
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(Any footnotes trail the end of each document.)
No. 01-30728

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ANTHONY L. VOGT, et al.
Plaintiffs-Appellants,

v.

BOARD OF COMMISSIONERS OF THE
ORLEANS LEVEE DISTRICT, and JAMES HUEY,
Defendants-Appellees.

June 14, 2002, Decided

COUNSEL:
For ANTHONY L VOGT, WARNER C VOGT, JANET VOGT PARKER, STEVEN REED VOGT, RAYMOND VOGT, ALVIN VOGT, ELIZABETH NELSON FARBER, JOHN J VOGT, III, PATTY ANN VOGT, MONICA VOGT WERTZ, ALLAN M EDGECOMBE, WILBERT J EDGECOMBE, LLOYD R EDGECOMBE, HAROLD C EDGECOMBE, MARGUERITE EDGECOMBE ROSENTHAL, AUDRY EDGECOMBE REICHERT, FRANKLIN PENROSE EDGECOMBE, III, EULA EDGECOMBE CLEMENT, ERBA M CORDELL, CHARLES A LEE, JR, MAUREEN LEE HEATH, ANDREW FRANCES LEE, KATHLEEN LEE MACHADO, BYRON LEE, Plaintiffs - Appellants: Philip A Gattuso, Gretna, LA. Robert Elton Arceneaux, Metairie, LA.

For BOARD OF COMMISSIONERS OF THE ORLEANS LEVEE DISTRICT, JAMES HUEY, Defendants - Appellees: George L Carmouche, Baton Rouge, LA. Jeffrey Todd Nichols, Law Office of Jeffrey T Nichols, Baton Rouge, LA.

JUDGES:
Before JOLLY, JONES, and BARKSDALE, Circuit Judges.

OPINIONBY:
EDITH H. JONES

OPINION:

EDITH H. JONES, Circuit Judge:

In 1984, the Louisiana legislature passed an act ordering the Orleans Levee District to return land it had expropriated in 1924 to build a spillway. The levee district's board of commissioners, however, stalled the return of the property and have until this day fought not to repay mineral royalties that belong to the landowners. In this litigation, the levee district persuaded the district court to dismiss the landowners' constitutional takings claim. We reverse. The district is not immune under the Eleventh Amendment, and the landowners' pleadings state a takings claim.

I. BACKGROUND

The Orleans Levee District was created by the Louisiana legislature in 1890 for the purpose of protecting the City of New Orleans from floods. In 1924, the state legislature authorized the levee district's Board of Commissioners ("the levee board") to acquire 33,000 acres of land on the east bank of the Mississippi River about 50 miles south of New Orleans in order to build the Bohemia Spillway between the

River and the Gulf of Mexico. 1924 La. Acts 99. Approximately half of this land was public property transferred from the state; the other half was either expropriated or purchased under threat of expropriation from private owners. 1928 La. Acts 246; 1942 La. Acts 311.

In 1984, the Louisiana legislature decided to return the land taken for the Bohemia Spillway. Act 233 declared

> that the public and necessary purpose set forth in Act No. 99 of 1924, which may have originally supported the expropriation of property, or any right of ownership thereto, on the east bank of the Mississippi River in the parish of Plaquemines for the construction of a spillway, known as the Bohemia Spillway, has ceased to exist insofar as it ever may have affected the ownership of property, including mineral rights. The Legislature of Louisiana hereby orders the Board of Levee Commissioners of the Orleans Levee District, the board, to return the ownership of said property to the owners or their successors from whom the property was acquired by expropriation or by purchase under threat of expropriation.

1984 La. Acts 233; LA. CONST., art. VII, § 14(B). Act 233 also directed the levee board to "provide a thorough accounting . . . concerning all revenues received from the affected property." The Act was signed by the governor and went into effect on June 29, 1984.

The levee board was reluctant to hand over the Bohemia Spillway lands. The expropriated land had "proved to be useful for more than just a spillway," and by the mid-1980s,

the levee district was receiving about $ 3 million a year in mineral royalties from the land the board had expropriated in 1924. Board of Levee Commissioners of the Orleans Levee Dist. v. Huls, 852 F.2d 140, 141 (5th Cir. 1988). The levee board challenged the constitutionality of Act 233, but both state and federal courts rejected the argument that Act 233 was an unlawful taking of the levee district's property in violation of Article I, Section 4 of the Louisiana Constitution as well as the Fifth and Fourteenth Amendments of the United States Constitution. Board of Comm'rs v. Department of Natural Resources, 496 So. 2d 281, 285 (La. 1986); Huls, 852 F.2d at 141-43.

Following these adverse judgments, the levee board issued quitclaim deeds in 1991 and 1992, and title passed to the original landowners or their successors. However, the levee board refused to remit the mineral royalties that the levee district had received between June 1984 and the time the land was returned.

A group of 24 landowners then filed suit in state court requesting (1) a declaratory judgment confirming their ownership of the disputed mineral royalties, (2) an accounting of all mineral royalties paid to the levee board after June 29, 1984, and (3) a money judgment for the royalties that the levee board had not repaid. The Louisiana Court of Appeals held, based on the clear language of Act 233, that the levee board had no right to revenues from the expropriated property after the effective date of Act 233. Vogt v. Board of Levee Commissioners of the Orleans Levee Dist., 680 So. 2d 149, 157-59 (La. App. 4 Cir. 1996), writ denied, 684 So. 2d 923. After an accounting, the Louisiana courts ordered the levee board to reimburse the landowners for $ 2,853,358.44 in unpaid mineral royalties. Vogt v. Board of Comm'rs, 738 So. 2d 1142 (La. App. 4 Cir. 1999), writ denied, 748 So. 2d 1166.

The levee board has refused to satisfy this $ 2.85 million judgment for unlawfully retaining the mineral royalties from 1984 to 1991-92. The landowners sought a writ of seizure, but Article 12, Section 10(C) of the Louisiana Constitution provides that property of the state, a state agency, or political subdivision is not subject to seizure. The landowners then sought a writ of mandamus, but Louisiana courts have long held that a judgment creditor may not use a writ of mandamus to force a political subdivision to appropriate funds to pay the judgment. n1

The landowners filed this action in federal court, claiming that the levee board's refusal to pay the judgment is an unconstitutional taking of their property without just compensation. The levee board now asserts that it is an "arm of the state" and is thus entitled to Eleventh Amendment immunity.

The district court concluded, based on "the weight of the case law," that the levee board is an arm of the state. The court granted the levee board's Rule 12(b) motion to dismiss for lack of jurisdiction, and the landowners now appeal. The district court's determinations are reviewed de novo as questions of law, like other questions of subject matter jurisdiction. United States v. Texas Tech Univ., 171 F.3d 279, 288 (5th Cir. 1999).

II. ELEVENTH AMENDMENT IMMUNITY

A

Federal court jurisdiction is limited by the Eleventh Amendment and the principle of sovereign immunity that it embodies. Seminole Tribe of Florida v. Florida, 517 U.S. 44, 54, 116 S. Ct. 1114, 1122, 134 L. Ed. 2d 252 (1996); Reickenbacker v. Foster, 274 F.3d 974, 976 (5th Cir. 2001). The "ultimate guarantee of the Eleventh Amendment," as the Supreme Court recently stated, is that

a non-consenting State may not be sued in federal court by private individuals, including its own citizens. Board of Trustees of the Univ. of Alabama v. Garrett, 531 U.S. 356, 363, 121 S. Ct. 955, 962, 148 L. Ed. 2d 866 (2001).

Even in cases where the State itself is not a named defendant, the State's Eleventh Amendment immunity will extend to any state agency or other political entity that is deemed the "alter ego" or an "arm" of the State. Regents of the Univ. of California v. Doe, 519 U.S. 425, 429, 117 S. Ct. 900, 903-04, 137 L. Ed. 2d 55 (1997). In other words, the Eleventh Amendment will bar a suit if the defendant state agency is so closely connected to the State that the State itself is "the real, substantial party in interest." Hudson v. City of New Orleans, 174 F.3d 677, 681 (5th Cir. 1999). The Eleventh Amendment will not bar a suit, though, if the political entity "possesses an identity sufficiently distinct" from that of the State. Pendergrass v. Greater New Orleans Expressway Comm'n, 144 F.3d 342, 344 (5th Cir. 1998).

There is no bright-line test for determining whether a political entity is an "arm of the State" for purposes of Eleventh Amendment immunity. Instead, "the matter is determined by reasoned judgment about whether the lawsuit is one which, despite the presence of a state agency as the nominal defendant, is effectively against the sovereign state." Earles v. State Board of Certified Public Accountants of Louisiana, 139 F.3d 1033, 1037 (5th Cir. 1998). In making this inquiry, this circuit traditionally has considered six factors: (1) whether state statutes and case law characterize the agency as an arm of the state; (2) the source of funds for the entity; (3) the degree of local autonomy the entity enjoys; (4) whether the entity is concerned primarily with local, as opposed to statewide, problems; (5) whether the entity has authority to sue and be sued in its own name;

and (6) whether the entity has the right to hold and use property. See, e.g., Cozzo v. Tangipahoa Parish Council-President Gov't, 279 F.3d 273, 281 (5th Cir. 2002); Anderson v. Red River Waterway Comm'n, 231 F.3d 211, 214 (5th Cir. 2000). n2 "The most significant factor in assessing an entity's status is whether a judgment against it will be paid with state funds." Delahoussaye v. City of New Iberia, 937 F.2d 144, 147-48 (5th Cir. 1991).

B

The district court did not discuss these six factors because it concluded that prior decisions of the Fifth Circuit and Louisiana Supreme Court "expressly identified the Levee Board as an arm of the state." However, the decisions cited by the district court involved issues fundamentally different from the one presented here. n3

1

The district courts relied in part on the Louisiana Supreme Court's decision in Board of Comm'rs v. Dep't of Natural Resources, 496 So. 2d at 288 (La. 1986) (holding that "the legislature's divestiture of levee district property does not constitute a taking of property by the state"). While this decision provides a thorough discussion of the scope of the state's police power with respect to political subdivisions, it offers little, if any, support for the proposition that the Orleans Levee District is an "arm of the state." n4

The levee board points out that Board of Commissioners refers several times to the levee district as a "creature or agency of the state". 496 So. 2d at 285, 289. Contrary to the levee board's assertions, however, calling the levee district a "creature or agency of the state" does not necessarily mean that it is an "arm of the state" within the meaning of Eleventh Amendment jurisprudence. This point

has been made repeatedly in our prior decisions. See e.g., Southwestern Bell Telephone Co. v. City of El Paso, 243 F.3d 936, 939 (5th Cir. 2001); Earles, 139 F.3d at 1036; Richardson v. Southern Univ., 118 F.3d 450, 454 (5th Cir. 1997); McDonald v. Board of Mississippi Levee Commissioners, 832 F.2d 901, 906-07 (5th Cir. 1987) ("A reference to the Levee Board as an 'agency' of the state by Mississippi courts does not amount to a characterization of the Levee Board as an arm of the state."); Minton v. St. Bernard Parish Sch. Bd., 803 F.2d 129, 131 (5th Cir. 1986).

The principal reason for distinguishing between a "creature or agency of the state" and an "arm of the state" is that the former concept is far too inclusive to be useful for Eleventh Amendment analysis. As the Supreme Court succinctly observed,

> Ultimate control of every state-created entity resides with the State, for the State may destroy or reshape any unit it creates. "Political subdivisions exist solely at the whim and behest of their State," yet cities and counties do not enjoy Eleventh Amendment immunity.

Hess, 513 U.S. at 47, 115 S. Ct. at 404 (citations omitted).

On this same point, consider the Louisiana Supreme Court's explanation why the property held by the levee district was, "to all practical intents and purposes," still the property of the State itself. Board of Comm'rs, 496 So. 2d at 288. After determining that flood protection falls within the state's police power, then-Justice Dennis explained that

> the legislature may delegate, either expressly or implicitly, the exercise of the police power to

> subordinate boards, commissions or political corporations. Such power, however, belongs to the state; the police power may be exercised by agencies of the state only under a delegation of authority. The state retains the right to recall, abrogate or modify the delegation. Consequently, the legislature's prior delegation of police power to its creature or agency, the Orleans Levee District, authorizing it to levy taxes and to acquire land by expropriation, purchase or donation to build a spillway and maintain it for flood protection purposes cannot prevent the state from recalling, abridging or modifying this delegation of power.

Id. at 289-90. The Court's discussion of the State's police power with respect to its "creatures or agencies" makes no distinctions among the subordinate political entities. That is to say, departments within the executive branch, public universities, parishes, sheriff's departments, school boards, and municipalities are all "creatures or agencies of the State." All of these entities exercise "a slice of state power," and all are subject to having their powers recalled, abridged, or modified by the state. Southwestern Bell, 243 F.3d at 937-38, 939; Jacintoport Corp. v. Greater Baton Rouge Port Com., 762 F.2d 435, 438. Nevertheless, many of these "creatures or agencies of the State" indisputably are not protected by Eleventh Amendment immunity and cannot be considered arms of the state.

2

The appellees make a similar mistake by relying on this court's decision in Board of Levee Commissioners of the Orleans Levee Dist. v. Huls, 852 F.2d 140 (5th Cir. 1988). The issue in Huls was "whether an agency of the state [the

levee district] may sue the state under the Fifth and Fourteenth Amendments for an uncompensated taking of property. " Id. at 141. According to the district court, Huls "expressly identified the Levee Board as an arm of the state" and "held that the Levee Board was a state agency that employed the power of the state to expropriate land and therefore could not sue the state for an uncompensated taking of property." The district court's interpretation of Huls conflates two distinct categories: "agency of the state" and "arm of the state".

Huls, like Board of Commissioners, is predicated on the traditional understanding of the state's police power. The court explained that "A political subdivision acts for the state. Its power and its property come about only because it has the power of the state." Huls, 852 F.2d at 143. When the legislature revoked the levee district's authority to hold the Bohemia Spillway property, the levee board (qua agent) had no legal right to challenge the decision of the principal.

The focus in Huls is on "political subdivisions" or "agencies of the state" -- categories which include political entities that are beyond the purview of the Eleventh Amendment. Tellingly, the panel in Huls considered itself bound by a Supreme Court decision involving a municipality that sued a State:

> Virtually the identical issue was raised in City of Trenton v. State of New Jersey, 262 U.S. 182, 43 S. Ct. 534, 67 L. Ed. 937 (1923). In that case, the city argued that a state tax on the water the city took from the Delaware River violated the contract clause and the due process clause. The Court's holding was clear and unequivocal: those provisions of the Constitution "do not apply against the state in favor of its own

> municipalities." Id. at 192, 43 S. Ct. at 538. City of Trenton controls our decision. The [Levee] Board cannot sue the state for an uncompensated taking of property.

Huls, 852 F.2d at 142.

Huls did not hold that the levee board could not sue the State of Louisiana because the levee district was an arm of the state. Instead, Huls held that the levee board was a creature or agency of the state, and, like other creatures of a state -- including municipalities -- the levee board could not prevent the state, in the exercise of its police power, from revoking a prior delegation of authority. As in Board of Commissioners, the levee board's status as an agency or creature of the state is not determinative of the Eleventh Amendment question because many "creatures or agencies" of the state, notably municipalities, are not "arms of the state" for purposes of Eleventh Amendment immunity.

C

The issue here -- whether the Orleans Levee District is an "arm of the state" for purposes of the Eleventh Amendment -- has not yet been decided. We must "examine the particular entity . . . and its powers and characteristics as created by state law to determine whether the suit is in reality a suit against the state itself." Richardson, 118 F.3d at 452 (citations omitted). This examination is guided by the six factors listed above.

1

Characterization under state law. Louisiana statutes define a "levee district" as a "political subdivision of this state organized for the purpose and charged with the duty of constructing and maintaining levees, and all other things incidental thereto within its territorial limits." La. Rev. Stat.

Ann. § 38:281(6). A "political subdivision" is defined as any parish, municipality, "special district", school board, sheriff, or "other public or governmental body of any kind which is not a state agency." La. Rev. Stat. Ann. § 13:5102(B); see also Wynat Development Co. v. Board of Levee Commissioners, 710 So. 2d 783, 789-90 (1998) (stating that the Orleans Levee District is a "special district" within the meaning of § 13:5102(B)).

The statutory classification of levee districts as "political subdivisions" is significant. Our decision in Cozzo suggests that "political subdivision" under § 13:5102(B) and "arm of the state" are mutually exclusive. Cozzo, 279 F.3d at 281-82. While this may not be a hard-and-fast rule, virtually every other government entity classified as a political subdivision has been denied Eleventh Amendment immunity, perhaps because political subdivisions are more local in character. Hudson, 174 F.3d at 683-84. Moreover, political subdivisions are not part of any department within the executive branch of government. In every recent case in which a Louisiana political entity has been held to be an "arm of the state," the state agency being sued was part of a department within the executive branch. n5 Our prior decisions have gone so far as to suggest "that all Louisiana executive departments have Eleventh Amendment immunity." Champagne v. Jefferson Parish Sheriff's Office, 188 F.3d 312, 313. But in this case, the levee districts are separate political subdivisions and are not constituted as part of the executive branch of government.

Because the Louisiana Constitution and laws classify levee districts as "political subdivisions," which are usually local governmental units with no connection to the executive branch of government, the first factor points against Eleventh Amendment immunity.

Source of the levee district's funding. This second factor is given the greatest weight because one of the principal purposes of the Eleventh Amendment is to protect state treasuries. Cozzo, 279 F.3d at 281; Jacintoport, 762 F.2d at 440. Although this court traditionally uses the broad phrase "source of funding," our inquiry is more specific: "In assessing this second factor, we conduct inquiries into, first and most importantly, the state's liability in the event there is a judgment against the defendant, and second, the state liability for the defendant's general debts and obligations." Hudson, 174 F.3d at 687.

The state's liability for a judgment is often measurable by a state's statutes regarding indemnification and assumption of debts. In Hudson, the court focused on the same indemnification provision that is applicable in this case. The statute defining who is a state employee for purposes of indemnification specifically excludes "an official, officer, or employee of a municipality, ward, parish, special district, including without limitation a levee district, school board, parish law enforcement district, or any other political subdivision or local authority." La. Rev. Stat. Ann. § 13:5108.1(E)(3)(a); Hudson, 174 F.3d at 687-88. And the Louisiana Constitution provides that "No judgment against the state, a state agency, or a political subdivision shall be exigible, payable, or paid except from funds appropriated therefor by the legislature or by the political subdivision against which the judgment is rendered." La. Const. art 12, § 10(C) (emphasis added). Although the legislature has the authority to appropriate funds to pay a judgment against a levee district, the legislature certainly has no legal obligation to do so. Thus, no legal liability arises against the state in the event of a judgment against the levee district or its officers. On the other hand, judgments against state agencies or departments within the executive branch are treated as liabilities of the

state itself. See, e.g., Delahoussaye, 937 F.2d at 148; Darlak, 814 F.2d at 1059; Voisin's Oyster House, 799 F.2d at 186-87.

The levee board acknowledges that the state has no duty to pay a judgment against the levee district. The levee board has suggested, though, that it could go to the legislature and request that state money be appropriated to pay the judgment. This court has consistently dismissed such arguments as too speculative for Eleventh Amendment analysis: "We do not consider 'a state's voluntary, after-the-fact payment' of a judgment to be a liability against the state's treasury." Williams v. Dallas Area Rapid Transit, 242 F.3d 315, 321 (quoting Hudson, 174 F.3d at 689). We have left open the possibility that a state entity could show that the legislature -- even where it is not obliged to do so -- regularly appropriates money to pay judgments against the entity. In this case, however, the levee board can point only to an appropriation made in 1942 to reimburse the levee district for expenses incurred when the Orleans Levee District assumed the indebtedness of another levee district. This argument falls far short of demonstrating the legislature's de facto recognition of liability for judgments against levee districts.

The next step is to determine whether the state will indirectly fund a judgment against the levee district because the state either is responsible for general debts and obligations or provides the lion's share of the levee district's budget.

The Louisiana Constitution provides that "The full faith and credit of the state shall be pledged to the repayment of all bonds and other evidences of indebtedness issued by the state directly or through any state board, agency, or commission. . . . The full faith and credit of the state is not hereby pledged to the repayment of bonds of a levee

district, political subdivision, or local public agency." La. Const. art 7, § 6. Therefore, while the levee district has been granted the authority to issue bonds and incur debts, those debts are not backed by the state. See also Pendergrass, 144 F.3d at 345, 346.

With regard to the more general question of the levee district's budget, the Orleans Levee District receives very little funding from the state. The levee district generates its own revenues from the Lakefront airport, a casino, leases of property, fees from boatslips and marinas, and taxes. The district also receives income from various investment accounts currently worth $ 57 million. The levee board does not dispute these facts. At oral argument, counsel for the levee board pointed out that the district receives some state funds, even though they are usually in the form of capital outlays dedicated to specific projects. Because the state funds are already earmarked for other purposes, the state monies cannot be used to pay a judgment against the levee district. See Hudson, 174 F.3d at 688-89.

The levee board further contends that the State of Louisiana provides funds to the levee district indirectly, by allowing the district to levy taxes on property within the district. However, the levee district's exercise of a delegated power to tax does not speak to the question before us, namely, whether a judgment against the levee district will be paid out of the state treasury. See Williams, 242 F.3d at 320.

To sum up: The second factor (source of funds) points against Eleventh Amendment immunity. The Orleans Levee District is almost entirely self-supporting, and the funds provided by the State are earmarked for special projects. The levee district has the authority to tax and issue bonds, although the state specifically disclaims responsibility for any debts of the levee district. Of greatest significance is

that nothing in Louisiana law, or in recent practice, suggests that the State has any obligation with respect to judgments against the levee district.

3

Degree of local autonomy. "In our circuit, . . . the determination of an agency's autonomy requires analysis of the 'extent of the [entity's] independent management authority' . . . [as well as] the independence of the individual commissioners" who govern the entity. Jacintoport, 762 F.2d at 442.

The Orleans Levee District has considerable "management authority," as that term has been applied in Fifth Circuit caselaw. For example, the levee district is granted "full and exclusive right, jurisdiction, power and authority" over all levee-related matters within its territorial reach. La. Rev. Stat. Ann. § 38:307(A). Each levee district has the authority to issue bonds, raise taxes (up to a certain rate), and make all contracts necessary to perform their functions. La. Rev. Stat. Ann. § § 38:314, 38:335, 38:431, 38:401, 38:404, 38:306(A). The levee board has the authority to sell, lease, or otherwise dispose of property for the purpose of raising funds. La. Rev. Stat. Ann. § 38:336(A).

In carrying out these functions, the levee board operates with no oversight from the executive branch of government. Cf. Darlak, 814 F.2d at 1059-60 (emphasizing that the Charity Hospital of New Orleans was "under the direct control of the executive branch of government"). Furthermore, the state legislature exercises no oversight with respect to the levee district's budgetary matters, except perhaps to the limited extent that the district is subject to audits. See Williams, 242 F.3d at 321. On the whole, however, no branch of state government exercises

"supervisory control" over the day-to-day operations of the levee district, and that fact counsels against Eleventh Amendment immunity here. McDonald, 832 F.2d at 907; see also Williams, 242 F.3d at 321-22; Minton, 803 F.2d at 131-32.

The levee board correctly points out, however, that six of the eight commissioners serve at the pleasure of the Governor. La. Rev. Stat. Ann. § 38:291(K). Although the "vulnerability of the commissioners to the governor's pleasure militates against a finding of local autonomy," Jacintoport, 762 F.2d at 442, in this case, the governor's discretion is limited by statutory requirements that a commissioner must be a resident of the levee district and recommended by the local legislative delegation. La. Rev. Stat. Ann. § 38:304. This court stated in Pendergrass that residency requirements and local nominations (along with fixed terms, which are not present here) "tugged strongly" in favor of a finding of local autonomy, in spite of the governor's role in the appointment process. Pendergrass, 144 F.3d at 347. Moreover, Jacintoport suggests that the appointment process is given less weight than the scope of the entity's authority over its day-to-day activities. Jacintoport, 762 F.2d at 442. On balance, then, the levee district's considerable degree of local autonomy supports a finding of no Eleventh Amendment immunity.

4

Local versus statewide problems. This factor "properly centers on 'whether the entity acts for the benefit and welfare of the state as a whole or for the special advantage of local inhabitants.'" Williams, 242 F.3d at 322 (quoting Pendergrass, 144 F.3d at 347).

Limited territorial boundaries suggest that an agency is not an arm of the state. See, e.g., Cozzo, 279 F.3d at 282

(noting that a sheriff's duties are "generally performed only within a single parish"); Hudson, 174 F.3d at 690-91 ("We have found it highly useful to examine the geographic reach of the district attorney's prosecutorial powers."). The levee district's powers, considerable as they are, may be exercised only within clearly defined territorial limits. La. Rev. Stat. Ann. § 38:281(6). On the other hand, most entities that are entitled to Eleventh Amendment immunity have statewide jurisdiction. See Earles, 139 F.3d at 1038 ("The Board is concerned with regulating the practice of public accounting on a statewide, rather than a local, scale. This factor favors Eleventh Amendment immunity for the Board."); Neuwirth, 845 F.2d at 556 (same for Board of Dentistry); Voisin's Oyster House, 799 F.2d at 187 (same for Department of Wildlife and Fisheries).

The levee board's counter-argument is that the levee district is concerned with a statewide problem -- flooding -- and that the nature of the problem outweighs the narrow geographic boundaries of the levee district. However, primary education and law enforcement are also statewide concerns, yet school boards and sheriffs are not arms of the state. See Minton, 803 F.2d at 131-32; Cozzo, 279 F.3d at 282. As a general principle, then, the "arm of the state" analysis focuses on the tasks undertaken by the particular defendant. An exception may apply where the regional entity is an administrative division of a statewide system. See Williams, 242 F.3d at 321-22 & n.10; Delahoussaye, 937 F.2d at 148 (characterizing the University of Southwestern Louisiana as "only one component of the State College and Universities System"). But in this case, the 19 levee districts in the State of Louisiana are distinct entities and are not parts of a larger system.

In a case involving a levee district in Mississippi, this court observed, "While flood control along the Mississippi

River is undoubtedly important to the State of Mississippi, the problem of immediate and primary concern to the Levee Board is the maintenance of the levee within its district." McDonald v. Board of Mississippi Levee Commissioners, 832 F.2d 901, 908 (5th Cir. 1987). The same may be said of the Orleans Levee District. The fourth factor thus cuts against the levee district's entitlement to Eleventh Amendment immunity.

5

Authority to sue. Each levee district "may sue and be sued under the style of Board of Commissioners for the respective district." La. Rev. Stat. Ann. § 38:309(B). The levee board acknowledges the relevant statute but insists that the fifth factor (along with the sixth factor) is accorded significantly less weight than the others. See, e.g., Cozzo, 279 F.3d at 281.

6

Right to hold property. Louisiana statutes provide that "Each board of commissioners may buy and hold, sell and transfer, or exchange property." La. Rev. Stat. Ann. § § 38:306(A); see also La. Rev. Stat. Ann. 38:307 (outlining the specific powers of the Orleans Levee District). Nevertheless, the levee board insists that its right to use and hold property is "limited." The board cites Huls for the proposition that all of its property ultimately belongs to the state and that the levee district is merely exercising a delegated power. This argument misses the point; the relevant question is whether the levee district has the right to hold property in its own name, and it clearly does. This final factor -- like all of the others -- points away from Eleventh Amendment immunity.

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In sum, consideration of the six factors leads to the conclusion that the Orleans Levee District is not an arm of the State of Louisiana for purposes of Eleventh Amendment immunity. The district court erred in dismissing the landowners' action for lack of jurisdiction. n6

III. TAKINGS CLAIM

Since the district court had jurisdiction over this claim against the levee board, the case must be reversed and remanded for resolution on the merits. Although we express no opinion on the ultimate outcome, a brief word is necessary to clarify a single point discussed by both parties on appeal.

The levee board's attorney began his presentation at oral argument by saying, "I think it's clear this is not a takings case." The levee board argued in its motion to dismiss and in its brief on appeal that the landowners' "property" -- in the form of a judgment enforceable "through the processes set forth by the legislature" -- has not been taken and that the landowners' putative takings claim is nothing more than a suit to enforce a judgment against the board. n7 If the landowners ultimately prevail, the levee board continues, then every judgment creditor of a political entity is a potential plaintiff in a takings claim.

The landowners, on the other hand, emphasize that the right to receive mineral royalties is a recognized property interest under Louisiana law and that there is no longer any doubt as to ownership of the disputed royalties. As the state court judgments made clear, the landowners' interests in $ 2.85 million in royalties were settled by the passage of Act 233, and their claims for the property have since been reduced to judgment. Vogt, 680 So. 2d at 158; Vogt, 738 So. 2d at 1143-44. According to the landowners, the levee board's refusal to satisfy the judgment and pay over the

retained royalties constitutes a taking because the governmental entity is withholding private property from its owners, without offering compensation and without asserting a public purpose or any police power or other reasonable regulatory justification for the action. See Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 163-64, 101 S. Ct. 446, 452, 66 L. Ed. 2d 358 (1980); NOWAK & ROTUNDA, CONSTITUTIONAL LAW, § 15:12.

The only point requiring resolution at this stage is the levee board's insistence that the landowners' suit is not a takings claim but merely an attempt to execute the judgment of the state courts. We find no support for the levee board's premise that a decree of the Louisiana courts somehow converted private property (the mineral royalties) into public funds subject to an unenforceable lien. Cf. Webb's Fabulous Pharmacies, 449 U.S. at 163-64, 101 S. Ct. at 452 ("[A] State, by ipse dixit, may not transform private property into public property without compensation."). In the levee board's view, the state courts' holding that the landowners' judgment is unenforceable against the levee board effectively re-characterizes their property right in mineral royalties into an intangible claim against the levee board's property. Vogt, 814 So. 2d 648. What was the landowners' property has suddenly vanished behind a veil of sovereign immunity in state court. We hold, however, that this result is untenable against a federal takings claim.

We do not hold or imply, as the levee board contends, that every tort or breach of contract claim against a governmental entity necessarily becomes a takings claim. Our holding extends only to cases where, as in Webb's, the government has forcibly appropriated private property without a claim of right or of public or regulatory purpose.

Having clarified this preliminary point of law, we express no further opinion on the ultimate outcome of this case.

IV. CONCLUSION

For the foregoing reasons, the judgment of dismissal is REVERSED and the case REMANDED for further proceedings consistent herewith.

REVERSED and REMANDED.

Footnotes

n1 While this appeal was pending, the Louisiana Court of Appeals affirmed the trial court's orders denying the petitions for writs of mandamus and seizure. Vogt v. Board of Levee Commissioners of the Orleans Levee Dist., 814 So. 2d 648 (La. App. 4 Cir. 2002) ("This court recognizes and sympathizes with plaintiffs' plight in getting a judgment against the State or political subdivision satisfied. Nonetheless, this court is without constitutional or statutory authority to compel the Levee Board to pay the judgment rendered against it.").

n2 The Supreme Court applied a different six-factor test in a case involving a multi-state entity created pursuant to the Compact Clause. Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391, 99 S. Ct. 1171, 59 L. Ed. 2d 401 (1979). In a later case, also involving a multi-state entity, the Supreme Court focused primarily on the States' liability for a judgment against the entity. Hess v. Port Authority Trans-Hudson Corp., 513 U.S. 30, 115 S. Ct. 394, 130 L. Ed. 2d 245 (1994).

The Fifth Circuit has largely ignored Lake Country Estates and has instead used a six-factor balancing test used for determining whether a state agency is a "citizen" for purposes of diversity jurisdiction. See Richardson v.

Southern University, 118 F.3d 450, 452 n.8 (5th Cir. 1997). Moreover, the Fifth Circuit has held that Lake Country Estates and Hess are not applicable where the defendant is a single-state entity (as opposed to a multi-state entity created pursuant to the Compact Clause). Pillsbury Co. v. Port of Corpus Christi Auth. 66 F.3d 103, 104-05 (5th Cir. 1995). The Supreme Court apparently does not believe that its precedents are that limited. See Auer v. Robbins, 519 U.S. 452, 456 n.1, 117 S. Ct. 905, 908 n.1, 137 L. Ed. 2d 79 (1997) (applying Lake Country Estates and Hess to determine that the St. Louis Board of Police Commissioners is not an arm of the State of Missouri). And other circuits that have squarely addressed the issue have concluded that Lake Country Estates and Hess are "no less applicable" in cases involving single-state entities created by state law. Gray v. Laws, 51 F.3d 426, 432-33 (4th Cir. 1995); Mancuso v. New York State Thruway Auth., 86 F.3d 289, 293 (2d Cir. 1996).

n3 Two federal district court decisions specifically held that the Orleans Levee District is an arm of the state. Lange v. Orleans Levee District, 1998 U.S. Dist. LEXIS 2346, 1998 WL 88862 (E.D. La. 1998); Stevens v. Lopez, 1998 U.S. Dist. LEXIS 406, 1998 WL 13602 (E.D. La. 1998). For reasons discussed in the body of this opinion, those cases were wrongly decided.

n4 Furthermore, whether a particular political entity is an arm of the state is a question of federal law. See, e.g., Regents of the Univ. of Calif. v. Doe, 519 U.S. 425, 429-30 n.5, 117 S. Ct. 900, 904 n.5, 137 L. Ed. 2d 55 (1997). Even if Board of Commissioners had asserted that the levee district is an arm of the state, this court would not be bound by that pronouncement.

n5 See Champagne, 188 F.3d at 313 (Louisiana Department of Public Safety and Corrections); Earles, 139

F.3d at 1037 (State Board of Certified Public Accountants, an agency within the Department of Economic Development); Delahoussaye, 937 F.2d at 147 (University of Southwestern Louisiana, which was governed by the State College and University System, an agency within the Department of Education); Neuwirth v. Louisiana State Board of Dentistry, 845 F.2d 553, 556 (5th Cir. 1988) (Board of Dentistry, an agency within the Department of Health and Human Resources); Darlak v. Bobear, 814 F.2d 1055, 1059 (5th Cir. 1987) (Charity Hospital of New Orleans, which was governed by the Department of Health and Human Resources); Voisin's Oyster House v. Guidry, 799 F.2d 183, 186 (5th Cir. 1986) (Department of Wildlife and Fisheries); Fireman's Fund Ins. Co. v. Department of Transportation and Development, 792 F.2d 1373, 1376 (5th Cir. 1986)(Department of Transportation).

n6 In light of the resolution of this issue, we need not address the landowners' alternative argument that, even if the levee district were considered an arm of the State, the Eleventh Amendment would not bar their suit because the requested relief could be characterized as a "purely prospective order" directing the levee board to return the landowners' property.

n7 This court has the discretionary authority to decide issues of law, presented in the court below, where the relevant facts are uncontroverted and the proper resolution of the issue is beyond doubt. Green v. Levis Motors, Inc., 179 F.3d 286, 293 (5th Cir. 1999).

CIVIL ACTION NO. 00-3195 SECTION "L" (1)

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

ANTHONY L. VOGT, ET AL.,
Plaintiffs,

v.

BOARD OF COMMISSIONERS OF THE
ORLEANS LEVEE DISTRICT, ET AL.,
Defendants.

June 11, 2001, Decided

June 12, 2001, Filed, Entered

COUNSEL:
For ANTHONY L VOGT, WARNER C VOGT, JANET VOGT PARKER, STEVEN REED VOGT, RAYMOND VOGT, ALVIN VOGT, ELIZABETH NELSON FARBER, JOHN J VOGT, III, PATTY ANN VOGT, MONICA VOGT WERTZ, ALLAN M EDGECOMBE, WILBERT J EDGECOMBE, LLOYD R EDGECOMBE, HAROLD C EDGECOMBE, MARGUERITE EDGECOMBE ROSENTHAL, AUDRY EDGECOMBE REICHERT, FRANKLIN PENROSE EDGECOMBE, III, EULA EDGECOMBE CLEMENT, ERBA M CORDELL, CHARLES A LEE, JR, MAUREEN LEE HEATH, ANDREW FRANCES LEE, KATHLEEN LEE MACHADO, BYRON LEE, plaintiffs: Mack E. Barham, Robert E. Arceneaux, Travis Louis Bourgeois, Barham & Arceneaux, New Orleans, LA.

For ANTHONY L VOGT, WARNER C VOGT, JANET VOGT PARKER, STEVEN REED VOGT, RAYMOND VOGT, ALVIN VOGT, ELIZABETH NELSON FARBER, JOHN J VOGT, III, PATTY ANN VOGT, MONICA VOGT WERTZ, plaintiffs: Philip A. Gattuso, Philip A. Gattuso, Attorney at Law, Gretna, LA.

JUDGES:
Eldon E. Fallon, UNITED STATES DISTRICT JUDGE.

OPINIONBY:
Eldon E. Fallon

OPINION:

ORDER AND REASONS

Before the Court is defendants' motion to dismiss for failure to state a claim upon which relief may be granted pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. For the following reasons, defendants' motion is GRANTED.

I. BACKGROUND

This case involves a complaint for deprivation of civil rights brought by landowners in Plaquemines Parish, Louisiana against the Board of Commissioners of the Orleans Levee District ("Levee Board"). In 1924, the Louisiana Legislature authorized the Levee Board to acquire land fifty miles downriver from New Orleans to create the Bohemia Spillway. The Levee Board obtained the majority of property by purchase, donation, or expropriation. See Board of Levee Commissioners of Orleans Levee Board v. Huls, 852 F.2d 140, 141 (5th Cir. 1988).

Sixty years later, the Legislature determined that the public purpose for the Bohemia Spillway no longer existed. By state constitutional amendment and Act 233 of 1984, the Legislature directed the Levee Board "to return the ownership of said property to the owners or their successors from whom the property was acquired by expropriation or by purchase under threat of expropriation." In 1991 and 1992, the Levee Board returned title to the properties to the former landowners or their successors which included the plaintiffs in this case.

In addition to reclaiming title to the lands, plaintiffs also sought the royalties collected on the properties by the Levee Board. n1 In Vogt v. Board of Comm'rs of Orleans Levee District, the Louisiana Fourth Circuit Court of Appeal affirmed a judgment awarding plaintiffs $ 2,853,358.44 for revenues collected by the Levee Board on the properties from June 29, 1984 until the transfer of title in 1991 and 1992. 738 So. 2d 1142, 1144 (La. 4th Cir. 1998), cert denied, 748 So. 2d 1166 (1999). These royalties have not been paid.

Plaintiffs now bring suit in this court claiming that they have been deprived of their civil rights in violation of 42 U.S.C. § 1985 and the Fifth Amendment to the United States Constitution because the Levee Board has failed to pay the judgment for royalties obtained by plaintiffs against it in state court. The Levee Board responds that it is immune from suit in federal court because it is an agency of the state pursuant to the Eleventh Amendment to the United States Constitution. Moreover, the Levee Board explains that plaintiffs' claims are barred by res judicata and collateral estoppel and that no unjust taking of plaintiffs' property ever occurred.

II. MOTION TO DISMISS STANDARD

"Motions to dismiss for failure to state a claim are viewed with disfavor and rarely granted." Southern Christian Leadership Conference v. Supreme Court of State of Louisiana, 252 F.3d 781, 2001 WL 575601, at *4 (5th Cir. 2001) (internal quotations omitted). When considering a motion to dismiss, the district court should construe the complaint liberally and in favor of the plaintiff, assuming the truth of all facts plead in the complaint. See id. Dismissal of a complaint under Rule 12(b)(6) is not proper "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Brown v. NationsBank, 188 F.3d 579, 586 (5th Cir. 1999) (internal citations omitted). "Conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss." Fernandez-Montes v. Allied Pilots Ass'n, 987 F.2d 278, 284 (5th Cir.1993). "The question therefore is whether, in the light most favorable to the plaintiff and with every doubt resolved in his behalf, the complaint states any valid claim for relief." 5 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1357, at 601 (1969).

III. ANALYSIS

The central issue raised in defendants' motion is whether the Levee Board is a state agency immune from suit under Eleventh Amendment jurisprudence. The Eleventh Amendment provides that:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend XI. States may not be sued in federal court absent consent or congressional abrogation of sovereign immunity. See Pendergrass v. Greater New Orleans Expressway Comm'n, 144 F.3d 342, 343-44 (5th Cir. 1998) (citing Seminole Tribe of Florida v. Florida, 517 U.S. 44, 54-56, 116 S. Ct. 1114, 1122-24,134 L. Ed. 2d 252 (1996)). This jurisdictional bar applies to "suits in federal court by citizens of a state against their own state or a state agency or department." Voisin's Oyster House, Inc. v. Guidry, 799 F.2d 183, 185 (5th Cir.1986); see Hans v. Louisiana, 134 U.S. 1, 10 S. Ct. 504, 33 L. Ed. 842 (1890). Even if the state is not named as a party to the action, the Eleventh Amendment bars suit if the state is the real party in interest and public funds from the state treasury will pay for liability. See Pendergrass, 144 F.3d at 344 (citing Edelman v. Jordan, 415 U.S. 651, 663, 94 S. Ct. 1347, 1356, 39 L. Ed. 2d 662 (1974)).

The Court must therefore "determine whether the Orleans Levee Board is an arm of the state enjoying eleventh amendment immunity or whether it possesses an identity sufficiently distinct from that of the State of Louisiana to place it beyond that shield." Id. (quoting Minton v. St. Bernard Parish Sch. Bd., 803 F.2d 129, 131 (5th Cir.1986)). In deciding whether the Levee Board is an arm of the state entitled to Eleventh Amendment immunity, the Court considers several factors:

(1) whether the state statutes and case law characterize the agency as an arm of the state; (2) the source of the funds for the entity; (3) the degree of local autonomy the entity enjoys; (4) whether the entity is concerned primarily with local, as opposed to statewide, problems; (5) whether the entity has authority to sue and be sued in its own name; and (6) whether the entity has the right to hold and use property.

Id. Courts examining these factors with respect to the Levee Board have consistently found it an arm of the state immunized from liability in federal court by the Eleventh Amendment.

In Board of Levee Commissioners of Orleans Levee Board v. Huls, the Fifth Circuit analyzed a claim brought by the Levee Board against the Louisiana Department of Natural Resources for an unconstitutional taking of property. 852 F.2d at 141. The Levee Board challenged the constitutionality of Louisiana Act 233 of 1984 which ordered the return of property constituting the Bohemia Spillway to its former owners or their successors. See id. The Court held that the Levee Board was a state agency that employed the power of the state to expropriate land and therefore could not itself sue the state for an uncompensated taking of property under the Fifth and Fourteenth Amendments. See id. at 142-3.

Two courts in this district consider the Levee Board an arm of the state immunized from liability in federal court by the Eleventh Amendment. In Stevens v. Lopez, the court held that the Levee Board was a state agency immune from suit in federal court for a violation of 42 U.S.C. § 1983. See 1998 U.S. Dist. LEXIS 406, CIV.A. No. 96-4135, 1998 WL 13602, *1 (E.D. La. Jan. 14, 1998). In Lange v. Orleans Levee District, the court elaborated on the holding in Stevens by applying the six factor test to determine whether the Levee Board could be classified as an arm of the state. See 1998 U.S. Dist. LEXIS 2346, CIV.A. Nos. 97-0987, 97-0988, 1998 WL 88862 at *2 (E.D. La. Feb. 27, 1998). Although the court found that the Levee Board failed to satisfy every element of the test, the court in Lange held that the case law and the funding scheme of the Levee

Board characterized it is an arm of the state for purposes of Eleventh Amendment immunity. See id. at *3.

Plaintiffs dispute the reasoning of Lange and argue that the Levee Board is not an agent of the state because it fails to satisfy the six factors enumerated in Pendergrass. See 144 F.3d at 344. They analogize the Levee Board to other agencies which have failed the test and have been denied Eleventh Amendment immunity. See e.g., Pendergrass, 144 F.3d at 348 (denying immunity to the Greater New Orleans Expressway Commission). While the court in Pendergrass declined to extend Eleventh Amendment immunity to the Greater New Orleans Expressway Commission because it did not satisfy the six element test, the court in Lange applied the same test and found the Levee Board to be an arm of the state entitled to Eleventh Amendment Immunity. See Pendergrass, 144 F.3d at 348; Lange, 1998 WL 88862 at *3. Moreover, the Fifth Circuit expressly identified the Levee Board as an arm of the state in Huls, 852 F.2d at 143. Plaintiffs argue for an alternative interpretation of the Pendergrass factors but offer no compelling rationale for this Court to reject the analysis of Lange or to undermine the Fifth Circuit precedent in Huls.

The Louisiana Supreme Court also regards the Levee Board an agent of the state. See Board of Comm'rs of the Orleans Levee Dist. v. Dept. of Natural Resources, 496 So. 2d 281, 288 (La. 1986). In the state court action attacking the constitutionality of the act returning land to former owners and successors of Bohemia Spillway property, the Court explained that "a levee board is a creature or agency of the state brought into existence for the purpose of discharging the state's duties of flood protection." Id. at 288. The Court found that the Legislature had delegated the police power of the state to "its creature or agency, the Orleans Levee District, authorizing it to levy taxes and to

acquire land by expropriation, purchase or donation to build a spillway and maintain it for flood protection purposes . . . ." and that this delegated power could be recalled, abridged or modified by the state. Id. at 289-90. Therefore, the Louisiana Supreme Court confirms the well settled principle that the Levee Board is a creature or agency of the state. n2

Because the weight of the case law supports a finding that the Levee Board is an arm of the state immunized from suit in federal court under the Eleventh Amendment, plaintiffs cannot maintain their cause of action against defendants and their claims against the Levee Board must be dismissed. n3

III. CONCLUSION

For the foregoing reasons, the motion of both defendants to dismiss for failure to state a claim upon which relief may be granted pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure is GRANTED.

Done this 11 day of June, 2001
New Orleans, Louisiana

Eldon E. Fallon

UNITED STATES DISTRICT JUDGE

Footnotes

n1 The land purchased and expropriated by the state from private owners contained mineral deposits that contributed approximately three million of the total five million dollars in annual mineral revenues for the Bohemia Spillway area. See Huls, 852 at 141.

n2 The Louisiana Office of Attorney General also concluded in a recent opinion letter that under the reasoning of the Louisiana Supreme Court, "a levee district is a

political subdivision of the state acting as an agency of the State rather than a local government subdivision." La. Atty. Gen. Op. No. 00-486, 2001 WL 129267 at *2 (La. A.G. Jan. 17, 2001).

n3 Because the Court finds that the Levee Board is an arm of the state immune for liability in federal court, the Court need not address defendants' additional arguments concerning res judicata, collateral estoppel, and unjust taking.

No. 01-30728

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ANTHONY L VOGT; WARNER C VOGT; JANET VOGT PARKER; STEVEN REED VOGT; RAYMOND VOGT; ALVIN VOGT; ELIZABETH NELSON FARBER; JOHN J VOGT, III; PATTY ANN VOGT; MONICA VOGT WERTZ; ALLAN M EDGECOMBE; WILBERT J EDGECOMBE; LLOYD R EDGECOMBE; HAROLD C EDGECOMBE; MARGUERITE EDGECOMBE ROSENTHAL; AUDRY EDGECOMBE REICHERT; FRANKLIN PENROSE EDGECOMBE, III; EULA EDGECOMBE CLEMENT; ERBA M CORDELL; CHARLES A LEE, JR; MAUREEN LEE HEATH; ANDREW FRANCES LEE; KATHLEEN LEE MACHADO; BYRON LEE,
Plaintiffs - Appellants

v.

BOARD OF COMMISSIONERS OF THE ORLEANS LEVEE DISTRICT; JAMES HUEY,
Defendants - Appellees

July 8, 2002, Filed

OPINION:

ON PETITION FOR REHEARING EN BANC

PER CURIAM:

Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is

DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT

Edith H. Jones

United States Circuit Judge